UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0277

September Term, 2014

MANUEL D. RIVERA

v.

UNO RESTAURANTS, INC. ET AL.

Krauser, C.J.,
*Hotten,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: January 13, 2016

*Michelle D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

This appeal had its origin in a workers' compensation case brought by appellant, Manuel Rivera (hereinafter "Rivera"), against Rivera's employer, Uno Restaurants, Inc., and Uno's insurer, Massachusetts Bay Insurance Company, appellees. The issue that we must analyze and resolve in this case concerns an evidentiary ruling in the Circuit Court for Howard County made after Rivera filed a petition for judicial review of a decision by the Maryland Workers' Compensation Commission ("the Commission").

In this appeal, Rivera contends that the trial judge erred by allowing the jury to consider evidence that was (purportedly) barred by provisions set forth in Md. Code (2014 Repl. Vol.) Health Occupations Article ("HO"), § 14-410, which provides:

> **Discoverability or admissibility in evidence of documents from investigations and hearings.**
>
> (a) *Records not discoverable or admissible – In general*. – Except by the express stipulation and consent of all parties to a proceeding before the [State] Board [of Physicians], a disciplinary panel, or any of its other investigatory bodies, in a civil or criminal action:
>
> (1) The proceedings, records, or files of the Board, a disciplinary panel, or any of its other investigatory bodies are not discoverable and are not admissible in evidence; and
>
> (2) Any order passed by the Board or disciplinary panel is not admissible in evidence.
>
> (b) *Records not discoverable or admissible – Exception.* – This section does not apply to a civil action brought by a party to a proceeding before the Board or a disciplinary panel who claims to be aggrieved by the decision of the Board or the disciplinary panel.
>
> (c) *Other evidence not affected*. – If any medical or hospital record or any other exhibit is subpoenaed and otherwise is admissible in evidence, the use

> of that record or exhibit in a proceeding before the Board, a disciplinary panel, or any of its other investigatory bodies does not prevent its production in any other proceeding.

The issue of the applicability, *vel non*, of HO § 14-410 first arose in a *de bene esse* videotaped deposition of an expert called by Rivera's attorney in the circuit court action. During that deposition, counsel for appellees asked the expert witness: 1) about the status of his license to practice medicine in Maryland; 2) whether the expert witness had been placed on probation by the Maryland Board of Physicians; and 3) whether it was true that the Maryland Board of Physicians had placed him on probation "for failing to meet the standards of patients and the standard of care in three patient cases." The witness declined to answer those questions.[1]

Rivera contended below that even though appellees never introduced at trial the "proceedings, records, or files of the Board [of Physicians]," the questions at issue should have been stricken by the circuit court because the public policy of Maryland, as enunciated by the Maryland General Assembly in HO § 14-410, was to exclude from evidence "materials related to proceedings before the Maryland Board of Physicians in any civil or criminal action[.]" (Emphasis added.) In the alternative, appellant contended that any

[1]In this appeal, both sides recognize that even though Dr. McGovern never answered any of the questions at issue, questions in and of themselves can constitute impeachment evidence. *Elmer v. State*, 353 Md. 1, 15 (1999). As Judge Wilner said, speaking for this Court in *Craig v. State*, 76 Md. App. 250, 292 (1988), *rev'd on other grounds*, 316 Md. 551 (1989), *jdgmt. vacated on other grounds*, 497 U.S. 836 (1990): "[q]uestions alone can impeach" because questions can insinuate, they can suggest, and they can accuse.

possible probative value of the questions asked was far outweighed by the potential for prejudice inherent in the questions. The trial judge disagreed with Rivera's position and declined to strike the questions.

The jury returned a verdict that was unfavorable to the appellant, who noted this timely appeal in which he raises one question, which he phrases as follows:

> Did the Trial Court err when it undermined the purposes of Maryland Code Ann. Health Occ., 14-410 by allowing improper questions about the Consent Order entered by the Maryland State Board of Physicians against Dr. Kevin McGovern, which in turn biased the jury against Mr. Rivera and caused them to find against him?

I.
BACKGROUND

A. Proceedings Before the Maryland Workers' Compensation Commission

On May 18, 2011, Rivera was working as a cook at an establishment owned by Uno Restaurants in the Long Gate Parkway Shopping Center in Howard County. On that date, he was reaching overhead to get a container when he slipped and fell, hitting his head, neck and back on the floor. As a result of the fall, Rivera required medical treatment along with an orthopedic and neurological evaluation.

Rivera brought a workers' compensation claim against his employer and its insurer seeking recompense for injuries suffered in the May 18, 2011 accident. On November 2, 2012, the Commission issued an Order finding that Rivera, under "other cases," suffered a 12% industrial loss of use of the body as a result of the aforementioned accident. The

Commission divided the 12% industrial loss as follows: head (8%), neck (2%) and lumbar spine (2%). Rivera was dissatisfied with the Commission's finding in regard to the percentage of injury to his neck and lumbar spine. He was satisfied, however, with the finding of the Commission that he had suffered an 8% industrial loss of use to the head. Rivera filed a Petition for Judicial Review in the Circuit Court for Howard County, in which he claimed that the Commission's finding regarding the injury to his neck and lumbar spine were too low.

B. Proceedings in the Circuit Court for Howard County

Rivera's only medical expert was Dr. Kevin McGovern, an orthopedic surgeon. Dr. McGovern's *de bene esse* deposition testimony was videotaped on March 4, 2014. At the beginning of the deposition, counsel for Rivera asked Dr. McGovern a series of questions to establish his qualifications to give an opinion as an orthopedic surgeon. He testified, when questioned by counsel for Rivera, that he was licensed to practice medicine in the State of Maryland, that he was a board-certified orthopedic surgeon, and that in 1985 he had completed a four-year residency in orthopedic surgery at the Hahnemann University Hospital. Also, in establishing Dr. McGovern's qualifications, Rivera's attorney introduced into evidence a copy of Dr. McGovern's *curriculum vitae*, which showed that he had published several articles in the field of orthopedic surgery and had attended scores of medical meetings and other gatherings to improve his skills as an orthopedic surgeon.

Before Rivera's counsel submitted Dr. McGovern as an expert in the field of orthopedic surgery, the following exchange occurred:

> Q. [Counsel for appellees]: . . . Doctor, what is the current status of your medical license?
>
> [The Witness]: On the advice of my attorney, I'm not allowed to answer questions concerning the [B]oard.
>
> [Counsel for appellant]: Objection.
>
> Q. [Counsel for appellees]: Doctor, have you been placed on probation by the Maryland Board of Physicians?
>
> [Counsel for appellant]: Objection.
>
> [The Witness]: Based on the legal advice of my attorney, I'm not allowed to answer that.
>
> Q. [Counsel for appellees]: Okay. You are not willing to tell me or the members of the jury the current status of your license or whether you have been placed on any type of probation, or subject to any disciplinary measures by the Maryland Board of Physicians?
>
> [Counsel for appellant]: Objection.
>
> [The Witness]: On the advice of my attorney, I'm not allowed to answer those questions.

Later in the deposition, Dr. McGovern testified that Mr. Rivera, as a result of the subject accident, had a 15% permanent partial impairment of the body as a result of his neck injury and a 14% loss of use of the body due to his back injury.

At the videotaped deposition, during cross-examination, counsel for the appellees and Dr. McGovern engaged in the following colloquy:

> Q. [Counsel for appellees]: And you believe that you met the applicable standard of care in treating Mr. Rivera?
>
> [The Witness]: Yes.
>
> Q. [Counsel for appellees]: I may know the answer to this, but, isn't it true that the Maryland Board of Physicians has placed you on probation for failing to meet the standards of patients - - and the standard of care in three patient cases?
>
> [Counsel for appellant]: Objection, move to strike.
>
> [The Witness]: As you know, I'm not allowed to answer that question on the advice of my attorneys.
>
> Q. [Counsel for appellees]: . . . If you will not answer that, Doctor, then I will see if [Rivera's counsel] has anything further.

On the date that the jury trial in this matter commenced, counsel for Rivera filed a motion *in limine* to strike the portions of Dr. McGovern's deposition quoted above. When the motion *in limine* was argued, the following facts were established: 1) on January 16, 2013, Dr. McGovern and the Maryland State Board of Physicians signed a consent order in which the parties agreed: a) that Dr. McGovern would be placed on probation for two years; b) that he would pay a $10,000 civil fine within three months of the date of the order; c) the reason that his license was placed on probation was because, in three instances, he had failed to meet the appropriate standards of delivering quality medical care in violation of HO

§ 14-404(a)(22); and d) in addition, in regard to six patients, he had failed to keep adequate medical records in violation of HO § 14-404(a)(40).[2]

The consent order stated that the Board "reprimanded" Dr. McGovern. The consent order also provided that "this Consent Order is considered a Public Document" pursuant to Maryland Code (2009 Repl. Vol. and 2012 Supp.), Gov't. Article § 10-611 *et. seq.*

After the trial judge denied the motion *in limine*, a jury was selected. Immediately before opening statements of counsel were given, the court and counsel once again had a lengthy discussion as to whether the jury could consider the questions put to Dr. McGovern that are here at issue. At the conclusion of that discussion, the trial judge said:

> The Court has considered the arguments, and the additional information presented by [Rivera's attorney]. The Court is going to stand by its original decision, and this Court is going to deny the Motion in Limine.

After opening statements were made, Rivera's attorney introduced the videotaped deposition of Dr. McGovern into evidence. Rivera then testified, and the defense played for the jury the videotaped deposition of their expert, Dr. John Parkerson, a specialist in the field of occupational medicine.

The trial judge sent to the jury a verdict sheet containing two questions, which were:

> 1) Expressed as a percentage, what is Mr. Manuel Rivera's permanent partial disability as a result of his neck injury sustained on May 18, 2011?

[2]As a condition of probation, Dr. McGovern was required, *inter alia*, to complete certain medical-related courses.

> 2) Expressed as a percentage, what is Mr. Manuel Rivera's permanent partial disability as a result of his lower back injury sustained on May 18, 2011?

To both questions, the jury answered "2%." The trial judge then signed an order affirming the decision of the Commission.

In this appeal Rivera makes two major contentions: 1) § 14-410 of the Maryland Health Occupations Article is designed to exclude from evidence all material related to proceedings before the Maryland State Board of Physicians and therefore his objections should have been sustained; and 2) in the alternative, even if the questions were not barred by HO § 14-410, the objection nevertheless should have been sustained because the questions "had limited-to-no relevance to the determination of Mr. Rivera's permanent partial disability, and any probative value . . . [in regard to] Dr. McGovern's credibility was greatly outweighed by the substantial prejudice[] suffered by Mr. Rivera."

II.
ANALYSIS

A. Preliminary Matters

Appellees contend that the issue of whether the trial court erred in allowing the jury to consider the questions at issue is not preserved for appellate review because, at the point where counsel asked to play for the jury the videotaped deposition of Dr. McGovern, appellant's trial counsel failed to repeat his objection to the questions at issue. Appellees argue: 1) that under the dictates of Md. Rule 2-517(a), an objection to the admission of evidence is waived unless an objection to that evidence is made at the time the evidence is

offered or as soon thereafter as the grounds for objection become apparent; and 2) the denial of a motion *in limine* to exclude evidence will not preserve for review a decision to admit evidence if no contemporaneous objection of the evidence is made to the introduction of evidence at trial (citing *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244, 260-61 (2001)).

It is true that appellant's counsel did not object to the questions at issue contemporaneously with counsel's introduction of Dr. McGovern's deposition into evidence. But immediately before opening statements were made, counsel for appellants asked the court to reconsider its denial of the *in limine* motion. The court did reconsider its denial but, after hearing lengthy re-argument, the court decided not to change its ruling. Between that ruling and the introduction of Dr. McGovern's deposition, no evidence was introduced, the jury simply heard the opening statement of counsel.

The preservation rule generally applicable in cases where a motion *in limine* to exclude evidence has been denied is set forth in *U.S. Gypsum v. Baltimore*, 336 Md. 145, 174 (1994) as follows:

> Generally, where a party makes a motion *in limine* to exclude irrelevant or otherwise inadmissible evidence, and that evidence is subsequently admitted, "the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [its] objection for appellate review." *Prout v. State*, 311 Md. 348, 356, 535 A.2d 445, 449 (1988).

(Emphasis added.)

There is an exception to this general rule that was discussed and applied in *Clemons v. State*, 392 Md. 339, 361-363 (2006), and in *Watson v. State*, 311 Md. 370, 372 n.1 (1988).

The exception applies if two conditions are met, namely: 1) a judge, just prior to the admission of the contested evidence, has announced a final decision to admit the evidence; and 2) requiring counsel to repeat the objection shortly after the court has overruled it would elevate form over substance. *Clemons*, *supra*, 392 Md. at 363. The exception to the general rule enunciated in *Watson* and *Clemons* is here applicable. It would have served no purpose to make a contemporaneous objection at the point Rivera's counsel introduced the deposition into evidence in light of the fact that shortly before the deposition was introduced, the trial judge had made clear that his decision to allow the jury to hear the questions at issue was final. Any further objection would have been futile. In other words, to require a further objection would be to place form over substance. *Id*. at 363. Therefore, the issue is preserved.

B. Appellant's First Contention

Appellant's main argument in this appeal is that, as a matter of law, no information "stemming from a Board of Physicians investigation," can be introduced into evidence in any trial. Whether the trial judge was right or wrong in his interpretation of HO § 14-410 is a question of law. When presented with an evidentiary question that is governed by a principle of law, we review the trial judge's decision *de novo*. *See Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 82-83 (2007). In the *Hall* case, the Court of Appeals said that although ordinarily the standard of review with respect to a trial court's

ruling on the admissibility of evidence is that such matters are left to the sound discretion of the trial court, the application of that standard:

> "depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or *on a pure conclusion of law*." *Bern-Shaw* [*Ltd. Partnership v. Mayor and City Council of Baltimore*], 377 Md. [277] at 291, 833 A.2d [502] at 510 [(2003)] (emphasis added). If "the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo*." *Id*.; *Nesbit v. GEICO*, 382 Md. 65, 72, 854 A.2d 879, 883 (2004) (concluding that when a trial court's decision in a bench trial "involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review"), *quoting Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609, 612 (2002). *See also Bernadyn v. State*, 390 Md. 1, 8, 887 A.2d 602, 606 (2005) (concluding, in a criminal case, that a trial court's decision to admit or exclude hearsay is not discretionary and that "whether evidence is hearsay is an issue of law reviewed *de novo*").

Id. *See also State v. Daughtry*, 419 Md. 35, 46 (2011).

Because Rivera contends that a statute barred defense counsel from asking the questions at issue, we shall review the trial judge's decision *de novo*.

Appellees, in response to appellant's argument, point out, *inter alia*, that:

HO § 14-411(c) provides:

> Nothing in this section shall be construed to prevent or limit the disclosure of . . . [g]eneral licensure, certification, or registration information maintained by the Board . . . .

HO § 14-411(c) is important, according to appellees, because the questions here at issue (see pages 5 & 6, *supra*) all dealt with "licensure . . . information" concerning Dr. McGovern. Appellees also contend, citing *Unnamed Physician v. Comm'n.*, 285 Md. 1, 12

(1979), that the Court of Appeals, when construing Md. Code (1957, 1971 Rep. Vol., 1978 Supp.), Article 43 § 130(q) (the predecessor statute to HO § 14-410), stated that the General Assembly, when it enacted § 130(q), probably intended Article 43 § 130(q) to apply only to "a tort action for medical malpractice."[3] Therefore, according to appellee, HO § 14-410, which contains language nearly identical to the words used in Article 43 § 130(q) had no applicability in the subject workers' compensation case. Lastly, the plain language of HO § 14-410, according to appellees, does not support Rivera's position because § 14-410 does not prohibit a litigant from asking questions about orders issued by the Board. As already mentioned, appellant reads HO § 14-410 so as to prevent a litigant from introducing into evidence "materials related to" proceedings before the Board.

To justify his position, Rivera first points out, accurately, that language very similar to that found in HO § 14-410(a) can be found in HO § 1-401(d) that governs information produced at hearings before medical review boards. Appellant stresses that the Court of

[3]The predecessor statute set forth in Article 43 § 130(q) concerned the Commission on Medical Discipline, which is the former name of the Board of Physicians. Article 43 § 130(q) reads:

> (q) *Admissibility in evidence of Commission's records*. - The records of any proceeding before the Commission or of any of its investigatory bodies or any order passed by the Commission may not be admitted into evidence in any proceeding, civil or criminal, except by the express stipulation and consent of all parties to the proceeding. This section may not be construed to prevent the production of medical records, hospital records, or any other exhibit in any other proceeding, provided that the medical records, hospital records, or other exhibit is legally subpoenaed and is otherwise admissible.

Appeals has characterized the statute involving medical review boards as providing a "medical review committee privilege." *See St. Joseph's v. Cardiac Surgery*, 392 Md. 75, 91-92 (2006), construing HO § 1-410(d). Based on the *St. Joseph's* case, appellant argues that HO § 14-410 should also be "construed as a privilege." We have no quarrel with that argument. HO § 14-410 does provide a Board of Physicians privilege but nothing said in the *St. Joseph's* case suggests that the scope of that privilege is as broad as appellant contends.

As the trial judge recognized, HO § 14-410(a) only excludes from evidence "proceedings, records or files of the Board . . ." and "order(s) passed by the Board . . . ." In this case, appellees did not seek to introduce into evidence any "proceedings . . . of the Board." In fact, in regard to Dr. McGovern, there were no "proceedings" before the Board inasmuch as no evidence was introduced and no hearing was held; instead, Dr. McGovern agreed to waive a hearing and to sign a consent order. Likewise, appellees did not seek to introduce into evidence, any records, orders or files of the Board. Therefore, a plain reading of HO § 14-410(a) shows that appellees' counsel did not violate that statute by asking any of the questions here at issue.

Rivera argues:

> The purpose of Section 14-410 is to prohibit juries from using information stemming from a Board of Physicians investigation to inform their decision.

He next makes a very similar assertion, *viz*:

> Section 14-410 of the Maryland Health Occupations Article is designed to prohibit everything from a Maryland State Board of Physicians disciplinary investigation from being used in any trial.

The key phrase in the first argument is "stemming from a Board of Physicians investigation[.]" The key phrase in the second argument is "designed to prohibit everything[.]" The trouble with the aforementioned arguments is that nothing in appellant's brief supports his position that the purpose of § 14-410 was to prohibit juries from "using information stemming" from an investigation by the Board; similarly, nothing in appellant's brief supports the closely related assertion that § 14-410 was "designed to prohibit everything" from an investigation by the Board from being used in evidence. If the General Assembly wanted to make sure that all information "stemming from" an investigation by the Board be excluded from evidence or that "everything" from the Board's investigation be excluded, the legislature could easily have said so, but it did not. The only way we could give § 14-410 the broad reading that appellant advocates would be for us to add words to the statute. But the law is clear that where the words of a statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, an appellate court must give effect to the statute as the language is written. *Moore v. Miley*, 372 Md. 663, 677 (2003). Moreover, an appellate Court may neither add nor delete language so as to "reflect an intent not evidenced in that language[.]" *Condon v. State*, 332 Md. 481, 491 (1993).

For the reasons stated above, we hold that the trial judge did not err when he ruled that the questions at issue were not barred by HO § 14-410(a).

III.
APPELLANT'S ALTERNATIVE ARGUMENT

Appellant contends, in the alternative, that the trial judge erred when he failed to strike the four questions at issue because the prejudice to him outweighed the probative value of the questions. The applicable standard of review to be applied in considering this alternative contention is markedly different from the *de novo* standard we utilized in examining appellant's first contention. In regard to appellant's alternative argument, it is well established that "the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of such discretion." *Oken v. State*, 327 Md. 628, 669 (1992).

There was at least some probative value in the questions asked of Dr. McGovern. The four questions, when read in combination, brought to the jury's attention the fact that although Dr. McGovern was indeed still licensed to practice medicine in Maryland, his license was in a probationary status. The *voir dire* by Rivera's counsel, coupled with Dr. McGovern's *curriculum vitae* strongly implied that Dr. McGovern's medical credentials were sterling. The questions at issue offset, potentially at least, that evidence as to Dr. McGovern's high medical standing by showing that although still licensed, his license was in a probationary status, due to his conduct as a doctor. Dr. McGovern's status as a doctor

was fair game for cross-examination in a case like this where the sole matter in dispute boiled down to a battle of the experts.

Appellant, citing *Lai v. Sagle*, 373 Md. 306 (2003), contends that the questions were highly prejudicial inasmuch as the questions "strongly impl[ied]" that Dr. McGovern was a "Bad Doctor." The *Lai* case is inapposite. In *Lai*, the Court of Appeals held that the trial judge committed reversible error when he failed to grant a mistrial in a medical malpractice action against Dr. Lai, when plaintiff's counsel said, in opening statements, that Dr. Lai, when he practiced in Michigan, had been sued five times for medical malpractice. *Id*. at 310-11, 324-25. The Court reversed the judgment entered against Dr. Lai, and held that evidence that a doctor had been sued for malpractice "is not probative of a physician's professional qualifications, or lack thereof." *Id*. at 321. By contrast, the fact that a doctor's license is in a probationary status due to his treatment of three patients, is probative of the doctor's professional qualifications.

Rivera disagrees and argues that the fact that Dr. McGovern had a "negative encounter" with the Board did not "affect his evaluation of permanent impairment . . . ." While this last assertion might make a good jury argument, it does not help appellant prove that the trial judge abused his discretion in weighing the probative value of the "negative encounter" against the potential for prejudice. When Dr. McGovern elected to give an expert opinion he necessarily put at issue his professional credentials. The questions asked of him were well within the bounds of what an attorney can appropriately ask when

challenging the opinions of an expert. We therefore hold that the trial judge did not abuse his discretion when he overruled appellant's objection to the four questions at issue.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.